Thornton v Telegraph Case and Defamation

Notes for RNZ Nine to Noon Media Law slot from Ursula Cheer (Associate Professor) Canterbury University, 4 August 2010.

1. Today it's back to defamation law, that good old stand-by! A lot is happening in this area in the UK, where, as I think I've noted previously, there is an ongoing campaign to free up the laws, and where London is being labelled the 'libel capital' of the world, a rather exaggerated claim. In any event, listeners might remember the Singh case discussed previously, where best-selling author Simon Singh had published an article criticising chiropractic and the British Chiropractic Association in the Guardian in 2008. When the BCA sued him, all sorts of prominent people, like Stephen Fry, PEN authors, etc, began to call for change to libel laws, although on rather confused grounds, it has to be said. The main complaints appeared to be about the outrageous cost of defending defamation actions, as well as suggestions that it is too easy for non-English nationals who don't live in the UK to sue there. Singh won his appeal and the case by the BCA has been dropped, but the campaign has continued, with the new coalition government being convinced to support a review of the laws with a view to reform.

2. Since the Singh case, there have been others which indicate that some English judges are interested in restricting defamation law as much as possible. One such case is Thornton v Telegraph Media Group, May 2010. This case involved a book review written by the famously tough-talking, chain-smoking journalist, Lynn Barber (whose coming of age story has been made into the recent successful film, 'An Education'). Ms Barber wrote a review of a book called 'Seven Days in the Art World' by Dr Sarah Thornton, which was published in the Daily Telegraph in 2008. Dr Thornton has

described herself as "an author, freelance writer and former full time academic, specialising in the sociology of culture and in ethnography".

3. The book consists of a series of seven fly-on-the-wall narratives based on seven different days covering events in the contemporary art world. In her review, Lynn Barber said "Sarah Thornton is a decorative Canadian with a BA in art history and a PhD in sociology and a seemingly limitless capacity to write pompous nonsense. She describes her book as a piece of "ethnographic research", which she defines as "a genre of writing with roots in anthropology that aims to generate holistic descriptions of social and cultural worlds". *She also claims that she practices "reflexive ethnography", which means that her interviewees have the right to read what she says about them and alter it. In journalism we call this "copy approval" and disapprove".*
4. Ms Barber went on to say '" *Thornton claims her book is based on hour-long interviews with more than 250 people. I would have taken this on trust, except that my eye flicked down the list of her 250 interviewees and practically fell out of its socket when it hit the name Lynn Barber. I gave her an interview? Surely I would have noticed? I remember that she asked to talk to me, but I said I had already published an account of my experiences as a Turner Prize juror which she was welcome to quote, but I didn't want to add to.*"
5. Dr Thornton sued the newspaper but not Ms Barber, arguing that the words in the review suggested she had been guilty of highly reprehensible conduct, and that she was untrustworthy or fatally lacking in integrity and credibility as a researcher and writer.

6. In September 2009, *The Telegraph* published an apology to Thornton for the claim from Barber that she was not interviewed by Thornton; the apology indicated that in fact she was. The following month, another judge struck out *The Telegraph*'s defence of fair comment regarding the accusation of "copy approval", which was seen to be another factual error in the book review. In June 2010, Justice Tugendhat in the High Court dismissed the claim for libel against the Telegraph in relation to the claim about Dr Thornton's copy approval practices.

7. The court had to deal with a rule called the single meaning rule. This means that a judge (without the jury being there) has to rule out any meanings which can only be put on the words by using a strained, forced or unreasonable interpretation. In other words, meanings which would not be found by a hypothetical reasonable reader who is not avid for scandal, who does not over-analyse, and who reads the article as a whole.

8. The Court therefore had to address possible definitions of the word 'defamatory'. It examined various definitions commonly used from older cases, such as:

> A statement which may tend to lower the plaintiff in the estimation of right-thinking members of society generally. *Sim v Stretch* [1936] 2 All ER 1237 at 1240 per Lord Atkin.
>
> A publication without justification which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule. *Parmiter v Coupland* (1840) 6 M & W 105 at 108 per Parke B.
>
> A statement about a man which tends to make others shun and avoid him. *Youssoupoff v Metro-Goldwyn-Mayer* (1934) 50 TLR 581 at 587 per Slesser LJ.

As well as:

Defamation shall consist of the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally. (the Faulks committee), and

A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.' (the definition used in the USA).

9. The Court then looked at the nature of earning your living as a professional writer. The judge accepted that a professional writer is free to write to different standards for different readerships or markets (whether the writer in fact does so or not), and found it likely that to suggest of a writer that she writes to one standard rather than another cannot of itself be defamatory.

10. More importantly, Justice Tugenhat then went on to imply a threshold of seriousness into the definition of what is defamatory. After examining both older and more recent cases, he concluded:

Whatever definition of "defamatory" is adopted, it must include a qualification or threshold of seriousness, so as to exclude trivial claims. This was accepted for two reasons:

i) It is in accordance with both past and current authority, where the definitions contained words such as 'likely to affect', and 'tend so to harm' and others which suggest a threshold has to be crossed.

ii) It is required by the development of constitutional law in the UK arising from the passing of the Human Rights Act 1998: in particular, regard for Art 10 which refers to freedom of expression requires it.

11. However, this does not mean a claimant has to prove that there has in fact been an effect upon him or her. It will be sufficient to show a tendency to

do so. Damage to the claimant is presumed in defamation – it is the logical corollary of what is already included in the definition.

12. The Court then applied this to the facts. The first paragraph containing the copy approval allegation was not capable of being a personal libel. It was not capable of meaning that Dr Thornton had done anything which in ordinary language could be highly reprehensible, or reprehensible at all, or bear any meaning defamatory of Dr Thornton on a personal basis. Neither was it a professional libel, because in the profession of writing, where professionals are free to write to different standards for different readerships, it could not be defamatory of her to allege that she did not apply in her book the standards of journalists relating to copy approval. Or if it was, then it simply did not overcome the required threshold of seriousness. Judgment was given in favour of the newspaper on this point. However, the case in relation to that part of the review is still proceeding through a different kind of claim called malicious falsehood. So also is the libel claim over Ms Barber's separate allegation that Dr Thornton had dishonestly included Ms Barber as one of her interviewees, in respect of which the Telegraph published the apology.

13. Yes, this case law could apply in New Zealand, since we use the definitions from the same English cases here. A threshold requirement of seriousness would be very useful to media and could make it harder for plaintiffs to sue. On one view, however, the decision could simply be seen not as creating a new threshold, but one judge emphasising that there is a need to toughen up on apparently trivial claims. The case also demonstrates, yet again, the increasing influence of human rights law, with its emphasis on the importance of preserving freedom of expression.

14. In the meantime in the UK, Lord Lester, otherwise Baron Lester of Herne Hill, QC, British politician, member of the House of Lords, and a member of the Liberal Democrats, has whipped up a reform bill which is currently before parliament. It affects a great many aspects of defamation, and includes Clause 12 which contains a requirement for claimants to demonstrate that they have suffered or are likely to suffer substantial harm as a result of the defamatory publication they have complained about. In determining this, the court must have regard to all the circumstances of the case. The main issue to arise from putting this into legislation would be the question of what is meant by substantial harm. It appears this would be left to the judges to decide, which is what happened in Thornton in any event.

15. The reforms will not do anything about high legal costs in these cases.

Ursula Cheer